Jurisdictional Statement

81-1594

No. ...

Office Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of John R. Rafter,
Deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

On Appeal From the Court of Appeals of
the State of New York

JURISDICTIONAL STATEMENT

ROBERT V. RAFTER,
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THE QUESTIONS PRESENTED

Does the combined refusal on the part of the FBI, the Department of Justice, the New York City Bar Association and the appellees to divulge the nature of the bar association file[1] so as to defeat appellant's oil monopoly antitrust claim against the estate violate Fifth Amendment and Fourteenth Amendment due process and equal protection rights.

1. File located at the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, Index No. 1975-M2330.

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No. ...

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of John R. Rafter,
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ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

On Appeal From the Court of Appeals of
the State of New York

JURISDICTIONAL STATEMENT

Appellant, Robert V. Rafter, appeals from the October 27, 1981, order of the Court of Appeals of the State of New York dismissing sua sponte appellant's appeal pursuant to Rule 500.2(f) of that Court.

OPINIONS BELOW

The decision of the Court of Appeals of the State of New York announces the dismissal without more, and it is appended at page A1. No other opinion was rendered by the Court.

JURISDICTION

The judgment sought to be reviewed was entered October 27, 1981. A Notice of Appeal was timely filed with the Clerk of the Court of Appeals of the State of New York on December 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

THE CONSTITUTIONAL PROVISIONS INVOLVED AND THE STATE LAW UNDER REVIEW

The Constitutional Provisions involved are the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and the Due Process

Clause of the Fourteenth and Fifth Amendments to the Constitution of the United States:

> "... No State shall ... deny to any person within its jurisdiction the equal protection of the laws."
>
> "... nor shall any State deprive any person of life, liberty, or property without due process of law; ..."
>
> "No person shall ... be deprived of life, liberty, or property, without due process of law;..."

Rule 500.2(f) of the Rules of the Court of Appeals of the State of New York and Section 51 of the Judiciary Law of New York, McKinney's Book 29, are set forth in the appendix at A30.[2]

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2. The designation A1 refers to the appendix. The designation A-1 refers to the appendix before the Appellate Division. The letter R followed by a number refers to the numbered document in the Record. R59 refers to the remittitur containing brief and appendix A-1 to A-61.

CONCISE STATEMENT OF THE CASE

I Jurisdiction

Jurisdiction seems proper because the Judicial Code requires a final judgment of the highest state court in which review can be had.[3] And when the highest state court has acted, its refusal to take jurisdiction is in effect an affirmance and as such may be the basis of an appeal.[4] The state court's denial of certiorari is sufficient although a review by a certificate of importance might still have been obtained.[5] It also appears that the Court is not bound by local law as to the finality of a decree.[6]

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3. 28 USC 1257.

4. Gregory v. McVeigh, 23 Wall. 294 (U.S. 1875); Western Union Tel. Co. v. Crovo, 220 U.S. 364 (1911); Matthews v. Huwe, 269 U.S. 262 (1925).

5. Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Rock, 279 U.S. 410 (1929).

6. Holcombe v. McKusick, 20 How. 552 (U.S. 1858); Sparrow v. Strong, 4 Wall. 584 (U.S. 1867; Louisian. Nav. Co. v. Oyster Comm. of La., 226 U.S. 99 (1912).

The Court of Appeals of the State of New York acted sua sponte in dismissing the appeal, and there is thus "drawn in question" the validity of Section 51 of the Judiciary Code of the State of New York,[7] from whence stems Rule 500.2 of that Court. Since neither notice nor hearing with respect to the proposed dismissal was afforded appellant,, it would appear that both the Rule and Section are federally unconstitutional.

That the Court of Appeals is aware of the necessity to provide reasonable notice and timely hearing is visible in its new Rule permitting sua sponte dismissal on the merits.[8]

---

7. Judicial Code of the State of New York, McKinney's Book 29, Section 51.

8. Court of Appeals Rules of Practice, PART 500; Rule 500.2(b) (NEW) Sua Sponte examination of the merits; effective January 1, 1982.

II Stage in Proceedings Federal Questions Raised

Denial of fourteenth amendment and equal protection rights was first raised in appellant's petition for a writ of mandamus (A12) at paragraph 9.:

> 9. Failure to act on the order to show cause is a denial of fourteenth amendment due process and equal protection rights.

In the order to show cause papers (R8 ,A-9) before the Surrogate's Court:

> To summarize the affidavits in support of this application: the administration of the estate and the proceedings before the Surrogate's Court evidence a denial of fourteenth amendment due process and equal protection.

In appellant's brief before the Appellate Division (R59), pages 3 and 4:

> Point I Concerted Concealment is a Denial of Due Process
>
> Point II Concealment Equals Fraud in the Procurement of the Decree

Point III The Proceedings Before the Surrogate's Court are a Denial of Fourteenth Amendment Due Process and Equal Protection

At page 2 of appellant's brief before the Appellate Division (R 59):

Questions Involved

(1) The basic question is whether the proceedings in the Surrogate's Court are a denial of fourteenth amendment due process and equal protection. The court did not address this matter.

(2) Subsidiary issues are whether there is concerted concealment on the part of the respondents and others. The court did not address this matter.

In appellant's notice of appeal (R60) to the Court of Appeals of the State of New York:

> ...where there is directly involved the construction of the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States, and appellant appeals from each and every part of said order of the Appellate Division as well as from the whole thereof.

Fifth and fourteenth amendment due process issues are raised before the Court of Appeals

of the State of New York in appellant's jurisdictional statement (A4) filed under Rule 500.2:

> (d)(1) Issues raised and to be raised include the following:
>
> I Concerted Concealment is a Denial of Due Process.
>
> II The Proceedings Before the Surrogate's Court are a Denial of Fourteenth Amendment Due Process and Equal Protection.
>
> (e) Fifth Amendment denial of due process is set forth at A-16 to A-31 of the papers on appeal before the Appellate Division.

and in appellant's supplement to jurisdictional statement (A7) before the Court of Appeals of the State of New York:

> (f) The alleged loss of constitutional rights stems from official acts of federal officers set forth in the papers on appeal referred to in (e) above, annexed and made a part hereof.
>
> Further substance to the constitutional issues can be found in the bar association file at the Appellate Division for the First Judicial Department, Index No. 1975-M2330.

...

(h) The petition for a writ of mandamus is based upon denial of fourteenth amendment rights directly involved in this proceeding from its commencement.

The Surrogate's Court did not address constitutional issues in denying (R 3) appellant's motion to vacate the estate decree, nor did the Appellate Division in its affirmance without opinion (R 59). The Court of Appeals for the State of New York dismissed the appeal for lack of jurisdiction (A2) without opinion.

III Statement of the Facts

The petition for a writ of mandamus set forth in the appendix at A9 to A13 also contains a concise statement of the facts.

Appellant filed a claim against the estate (R 5), and the claim was rejected (R 5) by the appellees (the executrix and her attorney). Allowance of the claim would militate against the interest of the

executrix as a distributee since it would extinguish the estate. Appellant moved to set aside the final decree in the estate (R 4) on the ground that it had been procured by fraud — through concerted concealment on the part of appellees ELIZABETH R. HIGGINS and GEORGE B. FARGIS and others, including the FBI, the Department of Justice, and the Bar Association of the City of New York (A 12), continuing and on-going to date.

IV Significance of Federal Questions Presented

The alleged loss of constitutional rights stems from official acts of federal and state officers (A 14 to A 29 and A9). Further significance of the constitutional issues can be found in the bar association file. Apparently the file is concerned with Anglo-Iranian Oil Co., Ltd. — the subject of investigation in In Re Investigation of World Arrangements With Relation to the

Production, Transportation, Refining & Distribution of Petroleum, 13 FRD 280 (U.S. Dist. Ct., District of Columbia, 1952). Bethuel Webster, N.Y.C., for Anglo-Iranian Oil Co., Ltd., also president of the bar association.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should grant plenary consideration of this matter in accordance with Rule 15.1(h) of the Court.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant

Appendix

APPENDIX

2 Mo. No. 1140 SSD 122

In the Matter of John R. Rafter, Deceased.

Robert V. Rafter,
Appellant,

Elizabeth R. Higgins, et ano.,
Respondents.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

DECISION COURT OF APPEALS OCT 27, 1981.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of October A.D. 1981.

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

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2 Mo. No. 1140 SSD 122
In the Matter of John R. Rafter, Deceased.

ROBERT . V. RAFTER,
Appellant,
ELIZABETH R. HIGGINS, et ano.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

Joseph W. Bellacosa
Clerk of the Court

Index No. Mo. No. 1140 SSD 122

IN THE STATE OF NEW YORK COURT OF APPEALS

- x

In the Matter of John R. Rafter, Deceased.

ROBERT V. RAFTER,
Appellant,

- against -

ELIZABETH R. HIGGINS and GEORGE B. FARGIS,
Appellees.

- x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROBERT V. RAFTER, the appellant above named, hereby appeals to the Supreme Court of the United States from the October 27, 1981, order of the New York Court of Appeals dismissing the appeal in the above matter. This appeal is taken pursuant to 28 U.S.C. 1257(2).
(signed by appellant with address).
(Filed December 24, 1981, Court of Appeals).

JURISDICTIONAL STATEMENT

COURT OF APPEALS
STATE OF NEW YORK
- x

In the Matter of John R. Rafter,
deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Respondents.

- x

Jurisdictional Statement Pursuant
to Rule 500.2

(a) (1) The title of the case:
In the Matter of John R. Rafter,
deceased.
ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Respondents.

(2) The appeal is taken from the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department.

(3) The Notice of Appeal was served by mail upon respondents on August 25, 1981; the Notice of Appeal was filed with the Clerk of the Surrogate's Court of Westchester County on August 26, 1981.

(4) Appellant has not been served with the order appealed from, nor with its notice of entry.

(5) The name and address of the attorney for respondents is: GEORGE B. FARGIS, 342 Madison Avenue, New York, New York, 10017.

(b) (1) A copy of the notice of appeal is appended.

(2) A copy of the order of the Appellate Division, entered June 1, 1981, appealed from is appended.

(4) There was no opinion by the Appellate Division.

(5) A copy of the order of the Surrogate's Court, dated December 9, 1980, and reviewed by the Appellate Division, is appended.

(6) There are no findings or conclusions upon which the order was entered. There was a decision, A-3.

(c) (1) Jurisdiction to entertain the appeal is set forth at Article 6, Section 3, of the New York State Constitution and at CPLR 5601.

(2) Authority to review the questionsof law presented by this appeal is set forth at CPLR 5501(b).

(d) (1) Issues raised and to be raised include the following:

I Concerted Concealment is a Denial of Due Process.

II The Proceedings before the Surrogate's Court are a Denial of Fourteenth Amendment Due Process and Equal Protection.

(e) Fifth Amendment denial of due process is set forth at A-16 to A-31 of the papers on appeal before the Appellate Division.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant

COURT OF APPEALS
STATE OF NEW YORK
- x

In the Matter of John R. Rafter, deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and GEORGE B. FARGIS,

Respondents.

- x

SUPPLEMENT TO JURISDICTIONAL STATEMENT

Appellant respectfully submits the following supplement to the jurisdictional statement:

(f) The alleged loss of constitutional rights stems from official acts of federal officers set forth in the papers on appeal referred to in (e) above, annexed and made a part hereof.

Further substance to the constitutional issues can be found in the bar association file at the Appellate Division for the First Judicial Department, Index No. 1975-M2330.

(g) The matter at hand was commenced by a separate proceeding, and that petition is annexed and made a part hereof.

Cohen and Karger, p. 146-7 (sec. 36), treat unsuccessful attempts to vacate for fraud as final orders appealable as of right.

(h) The petition for a writ of mandamus is based upon denial of fourteenth amendment rights directly involved in this proceeding from its commencement.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

x - - - - - - - - - - - - - - - - - - -x

ROBERT V. RAFTER,

Petitioner,

- against -

Hon. EVANS K. BREWSTER, Surrogate of the Surrogate's Court of Westchester County, ELIZABETH R. HIGGINS, Executrix of the Estate of John R. Rafter, deceased, and her attorney GEORGE B. FARGIS,

Respondents,

For an Order pursuant to Article 78, CPLR, directing respondent Hon. EVANS K. BREWSTER to entertain and to act upon petitioner's order to show cause application for an order vacating and setting aside the final judgment in said estate entered January 15, 1974, and for such other and further relief as may be just, proper and equitable.

x - - - - - - - - - - - - - - - - - - -x

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of ROBERT V. RAFTER respectfully alleges:

1. Petitioner is a citizen and resident of the State of New York.

2. Petitioner is an attorney at

law duly admitted to practice before the Supreme Court of the State of New York and the United States District Court for the Southern District of New York.

3. Petitioner is a distributee and a creditor of the Estate of John R. Rafter, deceased, administered before the Surrogate's Court of Westchester County, Index No. 2112/71.

4. Respondent, the Hon. EVANS K. BREWSTER, is the Surrogate of the Surrogate's Court for Westchester County.

5. Respondent ELIZABETH R. HIGGINS is the Executrix of the Estate of John R. Rafter, and respondent GEORGE B. FARGIS is the attorney for the said executrix.

6. On July 9, 1980, petitioner made application to respondent Hon. EVANS K. BREWSTER for an order to show cause for an order vacating and setting aside the final judgment entered in said estate,

for fraud, misrepresentation and other misconduct on the part of respondents ELIZABETH R. HIGGINS and GEORGE B. FARGIS in obtaining the judgment and on the further ground of newly discovered evidence and conflict of interest.

7. Respondent Hon. EVANS K. BREWSTER refused to entertain said application and rejected said application as more particularly appears from the letter of the Deputy Chief Clerk of the Surrogate's Court dated July 22, 1980, annexed hereto and made a part hereof.

8. Said refusal to act on the part of respondent Hon. EVANS K. BREWSTER is a refusal to perform a duty required by law, and petitioner respectfully seeks a writ of mandamus, pursuant to Article 78 CPLR, to compel the Surrogate to act on the application.

9. Failure to act on the order to show cause is a denial of fourteenth amendment due process and equal protection rights.

10. No appeal lies from a refusal to consider an ex parte application.

11. The application was made ex parte at the written request of the Surrogate's Court.

12. No other relief is open to petitioner than that of mandamus.

13. No previous application for the relief sought herein or for similar relief has been made to this Court or any other Court.

14. Copies of the application of July 9, 1980, and supporting affidavits and exhibits are annexed hereto and made a part hereof, together with FBI and bar association data evidencing a continuing fraud through concerted concealment on

the part of respondents ELIZABETH R. HIGGINS and GEORGE B. FARGIS and others continuing and on-going as of the date of this petition.

15. This Article 78 proceeding is brought on by order to show cause so that the Court may direct that notice of the proceeding be given to others in accordance with the governing statute.

WHEREFORE, petitioner respectfully asks that an order be issued by this Court pursuant to Article 78, CPLR, directing and compelling respondent Hon. EVANS K. BREWSTER to entertain the aforesaid order to show cause application and to act upon it.

Dated: September 9, 1980.

(signed) ROBERT V. RAFTER,
petitioner

(Verification by petitioner).

Memorandum of law FBI action, A-16 to A-22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------x

ROBERT V. RAFTER,

Appellant,

- against -

FEDERAL BUREAU OF INVESTIGATION OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Appellee.

DOCKET NO.
79-6044

----------x

MEMORANDUM OF LAW OF APPELLANT

ROBERT V. RAFTER,
Attorney for appellant

Preliminary Statement

This action was commenced in March of 1977, and was assigned to the Honorable MARVIN E. FRANKEL. It is an action for records and amendment of records under the Freedom of Information and Privacy Acts. Plaintiff is an attorney at law.

The action was dismissed after production of records, and judgment dismissing the action was entered 22 August 1977. Plaintiff appealed, and this Court affirmed 3 March 1978.

Plaintiff moved under Rule 60(b) to modify the judgment to provide for legal fees and costs. The motion was filed 17 August 1978, and Judge FRANKEL resigned 30 September without acting upon the motion. The motion was assigned 13 November to the Motion Part, Room 506, before the Honorable CONSTANCE B. MOTLEY. Judge MOTLEY denied the motion by order entered 12 December 1978. Plaintiff now appeals from this order.

The Scheduling Order herein permits the filing of a Memorandum rather than a Brief, and attachments rather than a joint appendix. The previous Docket No. is 77-6186 and that joint appendix is designated Exhibit A in the present Record.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------x

ROBERT V. RAFTER,

Appellant,

- against -

DOCKET NO.
79-6044

FEDERAL BUREAU OF INVESTIGATION
OF THE UNITED STATES DEPARTMENT
OF JUSTICE,

Appellee.

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MEMORANDUM OF LAW OF APPELLANT

This is an appeal from the denial of plaintiff's application for attorney fees and costs. Plaintiff sought modification of the judgment of dismissal so as to provide for an award of legal fees. The motion papers include an affidavit of services rendered supported by an itemized list of the services.

The Statute

Both the FOIA and the PA provide that the Court may award attorney fees and costs to a complainant if he substantially prevails[1]. By bringing suit plaintiff compelled immediate production of the records sought, in

1. 5 USC 552(a)(4)(E) and 5 USC 552a(g)(3)(B).

advance of the seven thousand case backlog.[2] Thus, the threshold tests of the Second Circuit in the Vermont[3] case have been met; i.e., that the suit was necessary, and that the suit had a causative effect upon production.

In similar circumstances the plaintiff in Exner v. Federal Bureau of Investigation, 542 F.2d 1121, 1123 (CA 9th 1976), and 443 F.Supp. 1349 (S.D. Cal. 1978), obtained immediate production over the seven thousand case backlog, claiming need to review the records and to amend them, at p. 1354. The Court made an award of attorney fees and costs for District Court and Court of Appeals services, reaffirming the principle that "a grudging application of the provision would be clearly contrary to Congressional intent," and holding that when the information is delivered may be as important as what information is delivered.[4]

In Flower v. Federal Bureau of Investigation, 448 F. Supp. 567 (W.D. Tex 1978), at 574, the Court directed the parties to stipulate as to reasonable attorney fees and costs. There are many other cases of awards cited in the

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2. Oral Argument Transcript annexed, p. 5 to 11, 13 June 1977.
3. Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509 (CA 2nd 1976), at 513.
4. Exner, supra, p. 1352 and 1353.

motion papers, and to repeat them would seem redundant, except to say they include attorney fees for non-members of the Bar and to pro se attorneys.[5]

The Order Appealed From

The Honorable CONSTANCE B. MOTLEY states that the application is an afterthought. Appellant respectfully directs the Court's attention to the Complaint herein,[6] which demands (1) production, (2) right to amend, and (3) statutory attorney fees and costs. Attorney fees were not the overriding purpose of the action, but they were before the Court from its commencement.

Again, the order states that the matter should have been brought before the trial judge. It was. The motion was filed 17 August 1978 and Judge Frankel's resignation dates from 30 September 1978.

The order states the appeal was frivolous. Judge Sirica in the Bonfanti[7] case determined that in-agency review was irrelevant to the Privacy Act. So, the government's entire defense and "obstruction" of depositions was false. See its denial of possession of

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5. Cuneo v. Rumsfeld, 553 F.2d 1360 (CA D.C. 1977) at 1366.
6. Joint Appendix 4a, Record Vol I, Document 1.
7. Mervin v. Bonfanti, 410 F. Supp. 1205 (DC D.C. 1976), at p. 1206.

records in its Answer[8] to the Complaint, and see its Reply Affidavit[9] of 31 May 1977, stating that the PA statute, 5 USC 552a(f)(4), requires in-agency review of refusals to produce before an action can be commenced. Also, the Information Corp.[10] holds that, where there is a refusal to produce, the customary discovery rules apply.[11] Plaintiff's endeavors to hold depositions were denied. On the basis of Judge Sirica and the Information Corp. case plaintiff's appeal was more than valid.

The order states the application for attorney fees should have been made in the early stages of the action. Plaintiff could not move before the appellate services were completed (3 March 1978) nor before costs had been in curred (18 April 1978). The motion for fees and costs was made 17 August 1978, less than four months from the determination of costs. Rule 60(b) provides that the motion be made within a reasonable time. Four months would seem to be a reasonable time in this case. That the statute includes an award for services

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8. Joint Appendix 11a, Record Vol. I, Document 7.
9. Joint Appendix 53a, Record Vol. I, Document 16.
10. Information Corp. v. Dept. of Justice, 444 Fed. Supp. 458 (DC D.C. 1978).
11. The Department of Justice will not amend records without documentation, see Reg. 28 CFR 16.48.

on appeal is supported by Exner, supra, and the Shermco[12] case,

For the foregoing reasons appellant believes that the order of Judge Motley was improvidently issued.

Conclusion

For all of the above reasons it is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant, prose

12. Shermco Industries, Inc. v. Secretary of U.S. Air Force, 452 F. Supp. 306 (DC Tex. 1978) at 326.

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withheld pursuant to specific exemptions, and, at that time, the government would request Mr. Rafter to pursue his administrative remedies and appeal for any documents being held in accordance with the regulation.

It can be reported to the Court that I am told that in at least 50 percent of the appeal cases additional documents are turned over to a requester. So we would urge Mr. Rafter to allow the procedure to come to a conclusion, and then to follow his administrative remedies before burdening the Court with this request.

MR. RAFTER: By far, the better procedure in my estimation would be, your Honor, would be for the local F.B.I. to get the records, and I think they can get them in about ten seconds right at 69th Street, and give them to the Court to hear the matter de novo in camera under section 552AG3A, and then if the Court decides there are exemptions, the burden of proof is on the F.B.I. to prove it, and we will have the matter ironed out in no time at all.

If I have to go through Washington D.C. and bureaucracy, I will never get this record straight and these appeals that Mr. Hibsher keeps talking about, these administrative appeals are not mandatory, and the F.B.I., in refusing my request for access to local records, was obliged to advise me of my appellate rights.

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

They did not do so. Any appeal rights that there are, and I am sure there aren't any, have been waived by the F.B.I., and I am in court now, and I am in court for more than one reason. I am in here to get the records and then to amend them, and I don't want this case being held up, pending Washington's endeavors. I appreciate their problems down there.

In New York City, there is no backlog, there is no lack of personnel, no lack of funds and so far as I know, I could get the records tommorrow. They say they have sent the duplicative records to Washington. Why, I will never understand, unless I am permitted to examine them. I would think they have triplicate records in the local office and I am pretty sure they do.

Your Honor, in no way do I want this case held in abeyance while we wait for an answer to emerge from Washington, as I have said before, and I have a constitutional right here to examine the records and then copy them and then amend them.

THE COURT: I don't know that you have any constitutional right at all. You have a right under the Freedom of Information Act --

MR. RAFTER: That is what I meant.

THE COURT: It is different, and you are a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

lawyer.

MR. RAFTER: Yes, I am.

THE COURT: Mr. Hibsher, I appreciate the government's interest in orderly procedure, but there is also much talk these days about a very useful conception that applies to all of us, the notion of comity and of cooperation between the branches of government.

All this rigmarole about exhausting administrative remedies and making a big fat case out of this is interesting enough and a waste of your time and the F.B.I.'s time and my time. There is no earthly reason in any of these papers, even remotely suggested, once the case has gone to court, why you cannot extend to the Court a measure of particular cooperation, and pull his file, which the papers indicate is not voluminous, out of its exact chronological order, and see to it that we get a kind of resolution of where we stand quicker than your vague thirty or so days.

I am going to order you to do that as follows: I find that there is no special urgency for Mr. Rafter that requires an effort, which I think would be futile in any event, to reach a final disposition of this motion today.

At the same time, I find there is no special interest in the Government in insisting that Mr. Rafter wait

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
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around and see whether administrative remedies need to be exhausted.

There is also no special interest in the government in requiring that this Court now take the time and the effort to decide that exhaustion question which, on the submissions made to me, could well be academic in this case, because the government has represented that it doesn't know whether there will be anything to exhaust, that Mr. Rafter, once the file has been inspected, may get everything he wants. Am I correct so far on that, Mr. Hibsher?

MR. HIBSHER: If I may, your Honor: I gather that your Honor is asking us to withdraw Mr. Rafter's request from the chronological order of requests and to attend to that request first.

THE COURT: I don't care whether it's first, second or third. I am going to give you two weeks to attend to it.

MR. HIBSHER: May I just state the following: The time that our papers were filed with the Court, there were in excess of 7,000 backlog requests.

THE COURT: Please don't go through those numbers for me again. I read them.

MR. HIBSHER: Let me make the point, your Honor. To give Mr. Rafter's request preference right now

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for this Court to order the F.B.I. to do that, even to move it up from 30 days to two weeks would be giving this case preference, where there is a complete void of any special circumstances before the Court.

THE COURT: There is a special circumstance that you, as a representative of the United States Attorney, should know about, and that is that on your representation, you are asking the Court to expend a lot of it's time, apparently, your time is not very important to explore an exhaustion question that may be absolutely academic.

The notion that you have a kind of parade of horrors, that people are pouring into court under the Freedom of Information Act, is splendid, except that it is not true. So here is a man who is a lawyer, who is here, and you want to make a whole fat litigation out of it.

I have already got here a file that, from what I gather, regarding his situation, is thicker than your file of papers that he is trying to get to look at, and you won't even tell him or me whether there is anything to fight about, except for your religious worship of chronology.

The Court rejects that as a sacred consideration in the circumstances shown in your summary judgment papers. There isn't any horror of multitudes coming into court under the Freedom of Information Act.

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MR. HIBSHER: That is not the only problem. There is the problem of giving one requested preference over others.

THE COURT: You are not going to give it voluntarily unless you wish to. I wish you would because I wish the Department of Justice, including the F.B.I., could, on this as on other occasions, be somewhat more realistic, but, if you don't give it, I am going to order you to give it.

I don't see why you have to stick in the bark of your kind of religious chronology. It is not a preference. It is a man who for one reason or another has, perhaps, because he is a lawyer, which may be or ought to have some peripheral appeal to you, has felt that if his name is clouded currently by an F.B.I. investigation, there is somewhat more urgency for him in knowing what is going on than for some horticulturist who is self-employed in organic gardening somewhere.

He has that feeling and he has invested in it his part of making this thick file that I am accumulating with your further collaboration, and you say well, that is all very well, we have this skinny file for old Rafter, and we may get to it in around 30 days, judge; in the meantime, go to the library a lot and read about exhaustion of administrative remedies and your time isn't worth much while we

put it off.

You can spend a day or two deciding this great Freedom of Information Act case. Well, that is a hell of a way to run a government, both executive and judicial. I would like best if you would consent to give him an answer within two weeks, and give a copy to me so that we will know whether we have a federal case here or no federal case.

I think that would be the statesman-like course for your office to follow. If you feel you need to consult with anybody, I will give you to the end of the day to do that. That would be my preference.

Failing your selection of that voluntary course, I am going to order you to do that and then, of course, you have the right of appeal and all that, and we can blow this up into a really magnificient lawsuit.

MR. HIBSHER: Your Honor, you pointed out that I was a collaborator on these papers before.

Clearly the suit was insitituted by plaintiff here. We don't want to blow this case up at all. The F.B.I. has put on additional agents, and Mr. Rafter's file is currently being processed. I certainly will consult with my client today, but I know that it is my client's strong views that they not be forced to apply subjective standards to give preference to one man's request, because he is an attorney

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Docket entries FBI action, A-30 to A-31

Civ 1131 JUDGE FRANKEL 77

PAGE 2.

DATE	NR.	PROCEEDINGS
1-8-77	1.	Filed Complt. & Iss.Summns.
4-5-77	2.	Filed Pltff's Lette r appointing the Clerk of the Court to recieve papers for pltff.
4-7-77	3	Filed Pltiff's NOTICE OF MOTION for partial summary judgment, Rule 56(a) FRCP.
4-12-77	4	Filed Summons with Mgrshal's Return-- Served on: F.B.I. Atty. Gen. D.O.J. Served By: Mr. Albaho Certified Mail #955784 Dated: 3/28/77 3/30/77
04-18-77	5	Filed affdvt. of William Hibsher (AUSA) in opposition to Pltff's. mot: for summary judgment, etc. (Copy Mailed to Pltff. by Clerk).
04-27-77	6	Filed Pltff's. Memorandum of Law in support of motion for partial summary judgpant.
4-27-77	7.	Filed ANSWER by deft. US A
5-4-77	8.	Filed Pltffs. notice to take deposition of deft. on 5-19-77.
5-4-77	9.	Filed Pltffs. notice to take deposition of James Proter, on 5-20-87/
5-13-77	10.	Filed defts. affdvt. and notice of motion for an order staying discovery until at least 10 days after disposition of deft's motion to dismiss, or for summary judgment,or for a stay of the action pussuant to 5 U.S.C. 522(a)(6)(C). Ret. 5-26-77.
5-13-77	11.	Filed deft's memorandum of law in support of its motion for a protective order.
5-13-77	12.	Filed defts. affdvt. and notice of motion for an order dismissing the complaint Pursuant to Rule 12(b) of the F.R.of Civ. P. for failur to exhaust administrative remedies, alternatively, for an order pursuant to Fe. R. 56 granting summary judgment in favor of FBI, or for an order staying further judicial proceedings pending the completion of the administrative process. Ret. 5-26-77.
5-13-77	13.	Filed memorandumoflaw in support of the Govt's motion to dismiss for summary judgment, or for a stay.
5-18-77	14.	Filed Govts; rule 9(f) affdvtt in support of deft's motion for a protive order vacating the notices ofodeposition and staying all discoveryyin this action.
5-25-77	15.	Filed Pltffs. affdvt. and memorandum of law in oppositin to defts motions ret. 5-26-77.
5-31-77	16.	Filed defts reply affdvt. to pltff's 5-25-77 aafdvt in opposition: Gov'ts motion to dismiss etc...
6-17-77	17.	Filed Letter to Judge Frankel from Robert V. Rafter dtd 6-14-77.
6-28-77	18.	Filed Pltffs. affdvt. and notice of motion for an order pursuant to Rule 26(c) of the F.R. of Civ. P. permitting and compelling discover by deposition of the proposed deponentsserved herein with notices: 5-4-77 Ret. 7-1-77...
7-13-77	19.	Filed supplemental memorandum of law in support of deft's cross-motion for summary Judgmetn.
7-13-77	20.	Filed defts. statement pursuant to Rule 9(g).
7-21-77	21.	Filed Memorandum & Order deft. has moved for summary judgment dismissing the complaint. The latter motion will be granted..The complaint is dismissed..It is So Ordered.....FRANKEL,J. m/n
8-4-77	22.	Filed Pltffs. notice of motion for an order pursuant to Rule 9(a) of the General Rules of this court granting reargument of pltff's motion for discovery...Ret 8-8-77.

CONT'D ON PAGE 3

B

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 77 Civ. 11
Rafter, Robert V.	F.B.I. of the US Dept. Of Justice	PAGE 1 OF 3 PAGES

DATE	NR.	PROCEEDINGS
8-19-77	23	File Judgement, that defendant Federal Bureau of Investigation of the United States Department of Justice have judgement against plaintiff ROBERT V. RAFTER Dismissing the complaint...Clerk Mailed copy.
1-22-77		Filed Memo-End on documetn #22.....Motin denied....so Ordered.....FRANKEL..J...mailed Copy.
0-18-77		Filed Notice of Appeal from the order of the Hon. Judge Frankel. entered 8-22-7 denying pltff's motion to examine the deft. & others before trial. (mailed copy).
11-10-77		Filed Notice that the record on appeal has been certified & transmitted to the U.S. 2nd Circuit.
3-15-78		Filed transcript of record of proceedings, dated 5-14-77
3-22		Filed transcript of record of proceedings, dated 6-13, 77
4-3-78		Filed True copy of order from the USCA 2nd circuit...That the Judgment of the SD NY is affirmed.
8-17-78		Fld Pltff;s Affidavit & Notice of Motion modifing the judgment of the Court. Ret: 8-29-78.
8-25-78		Fld Deft's memorandum of law in support of pltff's motion to vacte & modify the court's judgment, which was affirmed by the Court of appeals
12-12-78	- -	Filed Memo Endorsed on notice of motion filed 8-17-78..... for all the foregoing reasons -.....The motion under Rule 60(b) and for counsel fees is therefore denied. So Ordered. MOTLEY,J m-e (mailed copy to prose pltff.)
2-9-79		Filed Pltff. notice of appeal from the order of Judge Motley filed 12-12-78. mailed copy to William Hibsher, Esq on 2-13-79.

A TRUE COPY
ATTEST: J. MICHAEL, Clerk

1. Court of Appeals may make rules of practice for its court

e court of appeals may from time to time adopt, amend, or nd rules, not inconsistent with the constitution or statutes of tate, regulating the practice and proceedings in the court. 09, c. 35; amended L.1945, c. 649, § 19, eff. April 9, 1945.

PART 500—RULES OF PRACTICE

00.2 Filing and Service of Appellant's Jurisdictional Statement

f) This court may determine, *sua sponte*, whether it has sub- t matter jurisdiction and authority to review, based on the pa- s submitted in accordance with this section and on such other tten argumentation as may be sought.

Best Copy Available

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1981

No. 81-1594

In the Matter of John R. Rafter, Deceased.

ROBERT V. RAFTER,

Appellant,

– against –

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether Rule 500.2 of the New York State Court of Appeals, and that court's sua sponte action in dismissing the appellant's appeal to that court is federally unconstitutional, in that the rule does not carry provisions requiring notice or hearing with respect to dismissals sua sponte.

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No. 81-1594

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of John R. Rafter,
Deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellee.

On Appeal From the Court of Appeals of
the State of New York

MOTION TO DISMISS

Appellees, Elizabeth R. Higgins and

George B. Fargis, respectfully move this Court to dismiss appellant's appeal from the order of the New York State Court of Appeals, dated October 27, 1981 on the ground that Rule 500.2 of the New York State Court of Appeals is in keeping with orderly presentation of appellate matters and is not repugnant to the federal Constitution, and under further grounds, that in the absence of a final judgment before this Court, jurisdiction should be denied.

MOTION TO AFFIRM

Alternatively, appellees move for the affirmance of the order of the New York State Court of Appeals, on the grounds that appellant did not petition for a rehearing below and there are adequate nonfederal grounds for the order

of the court below to be sustained.

STATUTE INVOLVED

The involvement here is not a statute but is a rule of the New York State Court of Appeals regarding Jurisdictional Statements required to be filed under Rule 500.2 of said court. Appendix to this motion carries a copy of said Rule 500.2 (AA-1).

STATEMENT

Appellant filed a claim in the Surrogate's Court of Westchester County against the estate of his father, John R. Rafter. The claim was rejected by appellees. Subsequently, appellant moved to set aside the final estate decree, on the purported grounds of fraud and concerted concealment. The Surrogate refused to entertain said application and

same was rejected by order dated December 9, 1980 (not appended).

Appellant then sought mandamus in Supreme Court, Westchester County, to compel the Surrogate to act (A9). There is nothing in the papers before this court showing the end disposition of the mandamus proceedings.

Subsequently, appellant appealed the December 9, 1980 order of the Surrogate to the New York State Supreme Court, Appellate Division, Second Department (not appended).

The Appellate Division sustained the Surrogate by order entered June 1, 1981 (not appended).

Thereafter on or before August 25, 1981 appellant appealed to the New York State Court of Appeals (not appended). His Jurisdictional Statement to the Court

of Appeals (A-4) claimed that the concerted concealment in the Surrogate's Court was a denial of due process and equal protection of the law.

Subject matter was noted for appeal to the Supreme Court of the United States on December 24, 1981, from the order of the New York State Court of Appeals, dated October 27, 1981 (A-3).

The New York Court of Appeals dismissed appellant's appeal to that court sua sponte upon the grounds that appellant's order below in the Appellate Division did not finally determine the proceedings within the constitution of the State of New York (A-2).

Appellant Rafter foundations his appeal to this court on the sole grounds that Rule 500.2 of the Rules of the New York Court of Appeals is unconstitutional, in that appellant was not given

notice or hearing with respect to jurisdictional dismissal sua sponte by said court.[1] (Attached as Appendix AA-1 is a copy of the New York State Court of Appeals Rule 500.2.)

ARGUMENT

The Court of Appeals Rules, are in keeping with the orderly presentation of appellate matters. They are not repugnant to the federal Constitution. The right to seek certiorari in the Supreme Court for the review of a state court

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1. Affixed to appellant's jurisdictional statement (A-14 through A-29) is material concerning matters in the federal court in regard to legal fees. Said material is completely unrelated and immaterial to the appeal to this court from the order of the New York Court of Appeals. It should accordingly be expunged from the statement.

judgment, exists by virtue of federal statute only. There are adequate nonfederal grounds for sustaining the order of the New York Court of Appeals, and in the absence of a final judgment jurisdiction should be denied by this Court.

Additionally, appellant's Jurisdictional Statement is confusing and is no more than a mishmash of legal notions. Completely unconnected is his statement of "The Question Presented" (Pg. i) relating to an oil monopoly claim, and his Jurisdictional Statement (Pg. 1) regarding his attack on the constitutionality of Rule 500.2(f) of the Rules of the New York Court of Appeals.

Appellant's contentions that he was deprived of his rights by the State Court of Appeals application of its Rule 500.2

is wholly without merit. There is a good reason to disregard his attack on this rather clear rule governing jurisdictional administration, particularly in a situation such as this, where the sole issue is the constitutionality of a procedural statute. This reason alone is grounds for dismissal of the appeal.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or the order below affirmed.

Respectfully submitted,

George B. Fargis
(Counsel of Record)
342 Madison Avenue
New York, N.Y. 10173
(212) 682-1170

Attorney for
Elizabeth R. Higgins
and George B. Fargis

CERTIFICATE OF SERVICE

I hereby certify that on the day of March, 1982, three copies of the Motion to Dismiss or Affirm were mailed, postage paid, to Robert V. Rafter, Esq., Post Office Box 583, Rye, New York 10580, Counsel for Appellant.

Appendix

APPENDIX

PART 500-RULES OF PRACTICE

Section 500.2 Filing and Service of Appellant's Jurisdictional Statement

(a) Within 10 days from the time the appeal is taken, appellant shall file with the clerk one copy of a statement which shall recite:

(1) the title of the case;

(2) the court from which the appeal is taken;

(3) the date of service and filing of the notice of appeal or the date of entry of the order granting leave to appeal;

(4) the date and type of service upon the appellant of the order or judgment appealed from, and its notice of entry; and

(b) There shall be filed with the statement a legible copy of:

(1) the dated notice of appeal, or the order granting leave to appeal;

(2) the order, judgment or determination appealed from;

(3) any other order brought up for review;

(4) the opinion or memorandum of the Appellate Division or other intermediate appellate court;

(5) the order, judgment or determination reviewed by the Appellate Division or other intermediate appellate court; and

(6) the formal or informal findings and conclusions upon which the order, judgment or determination was entered.

(c) The statement must give the constitutional, statutory, case, or other authority supporting the assertion that the court has jurisdiction to entertain the appeal and to review the questions raised. It must include a point heading identification of all issues already raised and likely to be raised, for purposes of subject matter indexing and calendaring; inclusion and identification of issues shall not be binding on counsel for brief writing or oral argument purposes.

(d) The filing of this statement is mandatory in all cases and, simultaneously with the filing, appellant shall serve counsel for all parties with a full set of the papers required by this section.

(e) Where a party will assert that a statute is unconstitutional, notice shall be given to the Attorney General in writing at the time of filing this jurisdictional statement, and a certification of the notification shall be included in this statement. The notification and a copy of the statement under this section must be sent to the attention of the Solicitor General at Albany, New York.

(f) This court may determine, sua sponte, whether it has subject matter jurisdiction and authority to review, based on the papers submitted in accordance with this section and on such other written argumentation as may be sought.